Supreme Court, U.S.
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NO. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

WALTER A. CONNOR, JR.,
Petitioner,

vs.

WESTERN PENNSYLVANIA TEAMSTERS
AND EMPLOYERS PENSION FUND,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Walter A. Connor, Jr.
Respondent In Pro Per
Grubbs Road, P.O. Box 269
Gibsonia, Pennsylvania 15044
(412) 443-7348

QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONER WAS AFFORDED DUE PROCESS OF LAW AS GUARANTEED BY ARTICLE OF AMENDMENT V OF THE UNITED STATES CONSTITUTION.

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The Petitioner filed a Fraudulent Conveyance of Personal Property action in the Civil Division of the Court of Common Pleas of Allegheny County, Pennsylvania, on April 9, 1993, and docketed at G.D. 93-13015.

Respondent Pension Fund filed a petition of Notice of Removal to the Judges of the United States District Court for the Western District of Pennsylvania, on September 2, 1993, and docketed at 93-1463.

The Petitioner and Respondent brought motions for summary judgment. The District Court denied Petitioner's motion for summary judgment and granted

Respondent's cross motion for summary judgment on December 23, 1993.

Petitioner appealed the District Court's decision to the United States Court of Appeals for the Third Circuit on December 31, 1993, and was docketed at 94-3023/94-3024.

The United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court on November 7, 1994.

Petitioner filed a petition for rehearing en banc, and the Court of Appeals for the Third Circuit denied the petition for rehearing on February 3, 1995.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 3, 1995. Petition for rehearing was denied on February 3, 1995. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Article of Amendment V of the Constitution of the United States which states in pertinent part:

> No person shall be deprived of life, liberty, or property without due process of law.

STATEMENT

On April 1, 1993, as well as on the first day of each subsequent month, the Respondent, the Western Pennsylvania Teamsters and Employers Pension Fund, (herein after "Respondent"), has voluntarily diverted the monthly pension benefit, which is rightfully the property of the Petitioner, to a third party; i.e. to the Internal Revenue Service.

Respondent alleges and maintains that its actions are compelled by Internal Revenue Service Form 668-W(c).

The form in question came to the Respondent's office accompanied by a "cover" letter which referred to "take home pay." Both the letter and the Form

668-W(c) were dated February 8, 1993, and arrived at the Respondent's office via United States Mail and were routinely date-stamped-in on March 3, 1993. There was no accompanying Notice of Seizure, Form 2433, even though the Internal Revenue Code states quite clearly in Section 6502(b):

> The date on which a levy upon property or right to property is **made** shall be the date on which the Notice of Seizure provided in Section 6335(a) is given. (Emphasis Added).

The absence of Form 2433 clearly signifies that no levy was ever **made** and that no levy exists or ever existed in the instant case.

Clearly Form 668-W(c) standing alone, is absent power to compel its recipient to do anything at all.

Further, on its face the form makes the following request:

> If no money is owed to this person, please complete the back of Part 3, attach it as a cover to the rest of the form and return all of the parts in the enclosed envelope.

Respondent should have complied with the above request for the following reasons:

A. There was no Notice of Seizure given. Consequently, no levy was ever made.

B. On the date Respondent received the form, it had no money or other obligation due and owing to the Petitioner; the monthly pension benefit for March, 1993 had been disbursed two days earlier on March 1, 1993.

The reverse side of Form 668-W(c) gives no instructions to its recipient and makes no requests at all. Instead, it

quotes excerpts of several Internal Revenue Code sections beginning with subparagraph (b) of Section 6331, which states in pertinent part:

> ... a levy shall extend only to property possessed and obligations existing at the time thereof.

An exception to the principle established above is created by subparagraph (e) Continuing levy on salary and wages.

> 1. Effect of levy. The effect of a levy on salary and wages payable to or received by a taxpayer shall be continuous from the date such levy is first **made** until such levy is released under Section 6343. (Emphasis Added).

Treasury Regulation 26 C.F.R. 301.6331(c) defines salary and wages as follows:

> Salary and wages includes compensation for services paid in the form of fees, commissions, bonuses, and similar items. (Emphasis added).

As shown, supra, the Treasury Department's own definition for salary and wages totally excludes any mention of, or reference to, monthly pension benefits. Consequently, pension benefits can only be properly reached via Subparagraph (c) of Internal Revenue Code Section 6331, which provides for successive seizures and requires that a subsequent levy be **made** each time property is seized and diverted.

Nearly thirty years ago the United States Congress passed the FEDERAL TAX LIEN ACT of 1966. The purpose of this legislative action was to adjust the federal tax laws to the Uniform Commercial Code. This important bill states in pertinent part:

> This bill is in part an attempt to conform the lien provisions of the Internal Revenue laws to the concepts developed in the Uniform Commercial Code. It represents an effort to

> adjust the provisions in the Internal Revenue laws relative to the collection of taxes...

Paragraph D(1) **Effect of levy (section 6331(b) of the code)** reads as follows:

> In the provision of present law authorizing the Internal Revenue Service to levy upon the property of a taxpayer who owes delinquent taxes, the bill adds a sentence specifying that this right to levy extends **only** to property of the taxpayer and in the possession of the person on whom the levy is **made**, or obligations to the taxpayer of the person on whom the levy is **made** WHICH ARE EXISTING AT THE TIME OF THE LEVY. The bill intends to make it clear, for example, that if a levy is **made** upon the bank account of a delinquent taxpayer and the bank surrenders the balance in the account at the time the levy is **made, THIS LEVY HAS NO EFFECT UPON SUBSEQUENT DEPOSITS MADE IN THE BANK BY THE TAXPAYER. IT IS INTENDED THAT THESE MAY BE REACHED ONLY BY SUBSEQUENT LEVIES**. (Emphasis Added).

Pursuant to the principles established, supra, by the FEDERAL TAX LIEN ACT of 1966: if a levy had been **made** by serving a Notice of Seizure, Form 2433, along with the Form 668-W(c) which was sent via mail and date-stamped-in by the Respondent on March 3, 1993, it would not have had <u>any</u> effect upon the March, 1993 monthly benefit, which had already been disbursed. Further, it could not reach the **April, 1993 benefit** which **would correlate to a subsequent deposit**, and as such would require that a subsequent levy be **made** which could only be accomplished by serving a subsequent Notice of Seizure, Form 2433.

Thus, due process would require that pursuant to Subparagraph (c) of Internal Revenue Code Section 6331, a separate, new, successive seizure be **made** for each

month that property was diverted. This protocol was not followed; therefore the constitutional mandate that property not be taken without due process of law was violated.

REASON FOR GRANTING THE PETITION

Because no Notice of Seizure was ever given to Respondent, no levy was ever **made**. Therefore, Respondent was negligent and failed to exercise due diligence in its capacity as Petitioner's fiduciary, and failed to safeguard and deliver in a timely manner, funds which are rightfully the property of the Petitioner. Respondent chose instead to voluntarily, repeatedly, and fraudulently convert such property to a third party; thus depriving Petitioner of his property as well as his constitutionally guaranteed right to due

process of law before his property was taken.

CONCLUSION

The petition for a writ of certiorari should be granted, the decision of the lower courts should be reversed, and Petitioner should be granted the relief prayed for in his original complaint.

Respectfully submitted,

Walter A. Connor, Jr.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WALTER A. CONNOR, JR. Plaintiff	)	Civil Action No. 93-1463
vs.	)	
WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYEES EMPLOYEES PENSION FUND Defendant.	)	

O R D E R

AND NOW, this 23rd day of Dec., 1993, after the plaintiff, pro se, filed an action in the above-captioned case, and after cross motions for summary judgment were brought by the plaintiff, Walter A. Connor, Jr. and the defendant, Western Pennsylvania Teamsters and Employees Pension Fund ("the Pension Fund"), as well as motions for a temporary restraining order and preliminary injunction were submitted by the plaintiff, and after a Report and Recommendation was filed by the Chief United States Magistrate Judge, and

the parties were granted ten days after being served with a copy to file written objections to the Report and Recommendation, and upon consideration of the objections filed by the plaintiff and the defendant, and the plaintiff's response to the defendant's objections, and upon independent review of the pleadings, and the Chief Magistrate Judge's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS ORDERED that the plaintiff's motion for summary judgment (Docket No. 6) is denied, that the defendant's cross motion for summary judgment (Docket No. 17) is granted, and that the plaintiff's motions for temporary restraining order (Docket No. 15) and preliminary injunction (Docket No. 16) is denied as moot.

"s/ Donald E. Ziegler"
United States District Judge

cc: Walter A. Connor, Jr.
Grubbs Road, Box 269
Gibsonia, PA 15044

Charles J. Streiff
1450 Two Chatham Center
Pittsburgh, PA 15219-3427

Honorable Robert C. Mitchell, Chief
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3023/3024

WALTER A. CONNOR, JR.,
Appellant in No. 94-3023

v.

WESTERN PENNSYLVANIA TEAMSTERS
AND EMPLOYERS PENSION FUND
Appellant in No. 94-3024

Appeal From An Order of Court Entered
December 23, 1993, In the United States
District Court For the Western District
of Pennsylvania at Civil Action
No. 93-1463 by the
Hon. Donald E. Ziegler (District Judge)

Submitted Pursuant to
Third Circuit LAR 34.1(a)
November 1, 1994

Before: GREENBERG, MCKEE, Circuit Judges
and POLLAK, District Judge*

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court dated December 23, 1993, be and is hereby affirmed.

---

*Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Costs taxed against the appellant/cross-appellee.

BY THE COURT,

"s/ unintelligible signature"
Circuit Judge

Attest:
"s/ P. Douglas Sisk"
P. Douglas Sisk, Clerk

Dated: November 7, 1994

Costs taxed in favor of Western Pennsylvania Teamsters and Employers Pension Fund as follows:

Total for Brief.....	$110.20
Total for Supplemental Appendix	63.50
Total for Reply Brief.....	34.80
Total for Docketing Fee....	105.00
Total.....	$331.50

Certified as a true copy and issued in lieu of a formal mandate on February 13, 1995.

Teste: "s/ P. Douglas Sisk"

Clerk, U.S. Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3023
No. 94-3024

WALTER A. CONNOR, JR.,
Appellant

v.

WESTERN PENNSYLVANIA TEAMSTERS
AND EMPLOYERS PENSION FUND

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, SAROKIN, Circuit Judges and POLLAK, District Judge*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who

---

*Voted as to Panel Rehearing Only.

participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

"s/ unintelligible signature"
Circuit Judge

Dated: Feb 03 1995

(2)

Supreme Court, U.S.
FILED

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

WALTER A. CONNOR, JR.,
Petitioner,

vs.

WESTERN PENNSYLVANIA TEAMSTERS
AND EMPLOYERS PENSION FUND,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WALTER A. CONNOR, JR., Plaintiff,	)	Civil Action No. 93-1463
vs.	)	
WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYEES PENSION FUND, Defendant.	)	

REPORT AND RECOMMENDATION

I. Recommendation:

It is respectfully recommended that the plaintiff's motion for summary judgment (Docket No. 6) be denied, that the defendant's cross-motion for summary judgment (Docket No. 17) be granted, and that the plaintiff's motion for temporary restraining order (Docket No. 15) and preliminary injunction (Docket No. 16) be denied as moot.

II. Report:

Presently before the Court for disposition are cross-motions for summary

judgment brought by the plaintiff, Walter A. Connor, Jr. and the defendant, Western Pennsylvania Teamsters and Employees Pension Fund ("the Pension Fund"), as well as motions for a temporary restraining order and preliminary injunction submitted by the plaintiff.[1]

The plaintiff, proceeding pro se, commenced this action in the Court of Common Pleas of Allegheny County, Pennsylvania, alleging that the Pension Fund has unlawfully paid his monthly pension benefit to the Internal Revenue Service ("IRS"), after it received a Notice of Levy from the IRS directing it to forward the plaintiff's monthly pension benefit to it. The defendant filed a timely notice of removal to this Court, and it is not disputed that the Court has original jurisdiction of this matter pursuant to 28 U.S.C. § 1331.

The record shows that the Pension Fund is a jointly trusteed multiemployer pension fund administered by the trustees and operated pursuant to the provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. ("ERISA")[2]; that the Pension Fund is administered for the purpose of providing retirement benefits for eligible participants[3]; that the plaintiff was an active participant in the Pension Fund for 28 years, and having retired, receives a monthly retirement benefit of $865.03 from the Pension Fund[4]; that on March 3, 1993, the Pension Fund received from the IRS a "Notice of Levy On Wages, Salary And Other Income", stating that the plaintiff owed the IRS the amount of $119,739.11[5]; and that said Notice of Levy required the Pension Fund to pay the plaintiff's monthly pension benefit

directly to the IRS effective with the payment commencing on April 1, 1993.[6]

The plaintiff contends that on or about March 10, 1993, he received a letter from the Pension Fund's counsel informing him that (pursuant to the Notice of Levy) the Pension Fund had decided to pay his monthly benefit of $865.03 directly to the IRS. The plaintiff then wrote letters to the Pension Fund's counsel and appeared before the Pension Fund's panel of Trustees expressing his belief that a bona fide court order was needed before his monthly pension benefits could be paid directly to the IRS. When the Pension Fund proceeded to pay his monthly benefits to the IRS absent a court order approving said payments, the plaintiff brought this action. He contends that as of August, 1993, the Pension Fund has unlawfully diverted a

total of $4,325.15 of his pension benefit to the IRS.

In his motion for summary judgment, the plaintiff does not dispute that he owed the IRS the amount of $119,739.11. Rather, he argues that the Notice of Levy was improper; that it was not accompanied by a notice of distraint or a notice of lien as required by provisions of the IRS; and that in complying with said Notice of Levy, the Pension Fund failed to follow the levy and seizure procedures of the Internal Revenue Code, such that it has unlawfully converted his property and denied him due process.

In its cross-motion for summary judgment, the Pension Fund argues that its Board of Trustees acted reasonably and in compliance with the provisions of the Internal Revenue Code in complying with

the Notice of Levy. In support of its position, the Pension Fund has submitted the affidavit of Raymond A. Huber, the Chairman Trustee of its Board of Trustees, who avers that from time to time the Pension Fund is served with a Notice of Levy from the IRS requiring it to pay a retiree's monthly pension benefit to the IRS until the assessment stated in the Notice is satisfied[7]; that in each instance, the Board of Trustees complies with the Notice of Levy and pays the affected retiree's monthly benefit (with exemptions deducted if appropriate), to the IRS[8]; and that in this case, the Board of Trustees considered the Notice of Levy and the IRS instructions that no exemptions be withheld[9], and it adhered to the Board of Trustees Report and Recommendation which denied the plaintiff's appeal before it complied with

the Notice of Levy[10]. The Pension Fund avers that its Board of Trustees considered and handled the instant Notice of Levy in the same manner as Notices previously served upon the Pension Fund for other retirees.[11]

In Resolution Trust Corporation v. Gill, 960 F.2d 336, 340 (3d Cir. 1992), the Third Circuit explained as follows:

> Where the taxpayer's property is held by another, the Government customarily serves a notice of levy upon the custodian. The notice of levy gives the IRS the right to all property levied upon and creates a custodial relationship between the third party and the IRS so that the Government gains constructive possession of the property [citing, United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985)].

A Levy is effective upon the IRS' service of the notice of levy. Id., citing, 26 C.F.R. § 301.6331-1(a) (1991).[12]

The tax levy procedure which permits the IRS to levy on property does

not violate due process. Christensen v. U.S., 733 F.Supp. 844, 853-54 (D.N.J. 1990), aff'd., 925 F.2d 416 (3d Cir. 1991). Further, the IRS may levy under § 6331 of the Internal Revenue Code without a judgment in a court of competent jurisdiction. Id. at 850. Thus, the Pension Fund was not required to obtain a court order before complying with the instant Notice of Levy, and there is no evidence which shows that said Notice was improper.

Section 6332(a) of the Internal Revenue Code, 26 U.S.C. § 6332(a), provides in relevant part:

> [A]ny person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary...

Pursuant to said mandate, the Pension Fund was required to surrender the plaintiff's monthly benefits to the IRS upon receiving the Notice of Levy.

Had the Pension Fund not complied with the IRS' Notice of Levy, it would have incurred personal liability pursuant to section 6332(d) of the Internal Revenue Code, 26 U.S.C. § 6332(d). In relevant part, § 6332(d)(1) provides:

> Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made...

It is also provided in section 6332(d)(2) that:

> In addition to the personal liability imposed by paragraph (1), if any person required to surrender property

> or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1).... 26 U.S.C. § 6332(d)(2).

Thus, the plaintiff's argument that the Pension Fund unlawfully converted his property is without merit.

Finally, it is clear that the Pension Fund is exempt from liability as to the plaintiff for complying with the Notice of Levy. Section 6332(e) of the Internal Revenue Code, 26 U.S.C. § 6332(e) provides in pertinent part:

> Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary ... shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.

Also see, Carman v. Parsons, 789 F.2d 1532 (11th Cir. 1986) (Trustees of pension fund in possession of taxpayers's property which is subject to tax levy are exempt from liability to said taxpayer for surrendering the property to the IRS).

Summary judgment is appropriate if the pleadings and discovery material, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56(c); Mason v. Shalala, 994 F.2d 1058 (3d Cir. 1993). Here, there is no genuine issue as to any material fact, and the defendant Pension Fund is entitled to judgment as a matter of law.

Therefore, for the reasons set forth above, it is recommended that the plaintiff's motion for summary judgment (Docket No. 6) be denied, that the

defendant's cross-motion for summary judgment (Docket No. 17) be granted, and that the plaintiff's motions for temporary restraining order (Docket No. 15) and preliminary injunction (Docket No. 16) be denied as moot.[13]

Within ten (10) days after being served with a copy, any party may serve and file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

Respectfully submitted,

"s/ Robert C. Mitchell"

ROBERT C. MITCHELL, Chief
United States Magistrate Judge

Dated: November 22, 1993

FOOTNOTES

1. In light of our instant recommendation as to the parties' cross-motions for summary judgment, the plaintiff's motions for temporary restraining order and preliminary injunction are moot.

2. See, Affidavit of Marie C. Olmsted at ¶ 4.

3. Id.

4. Id. at ¶ 6.

5. Id. at ¶ 9.

6. Id.

7. See, Huber Affidavit at ¶ 4.

8. Id.

9. See, Exhibit MO-4, which is attached to the Olmsted Affidavit.

10. See, Huber Affidavit at ¶¶ 5-6.

11. Id. at ¶ 5.

12. Although the plaintiff argues otherwise, ERISA qualified plans are not exempt from levy. See, Carman v. Parsons, 789 F.2d 1532 (11th Cir. 1986); In re Jacobs v. IRS, 147 B.R. 106 (W.D.Pa. 1992).

13. Although the Pension Fund seeks attorney fees and costs for the "frivolous and meritless nature of the plaintiff's

legal arguments", we decline to award such fees. It is within the Court's discretion to award attorney's fees under 29 U.S.C. § 1132(g)(1), and in making our determination, we have considered the following policy factors: (1) the offending party's culpability or bad faith; (2) the ability of the offending party to satisfy an award of attorney's fees; (3) the deterrent effect of an award of attorney's fees against the offending party; (4) the benefit conferred on members of the pension plan; and (5) the relative merits of the party's position. See, Gray v. Dow Chemical Co., 615 F.Supp. 1040, 1045 (W.D.Pa. 1985), aff'd., 791 F.2d 917 (3d Cir. 1986). No one of these factors is determinative, and not all of said factors must be considered. Trucking Emp. of N. Jersey Welfare F. v. Brockway, 130 F.R.D. 314, 325 (D.N.J. 1989). Here, since the plaintiff has neither exhibited bad faith in these proceedings, nor appears able to satisfy an award of attorney's fees in light of the IRS levy on his monthly pension benefit, we find it inappropriate to award such fees.

SUPREME COURT, U.S.
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No. 94-1824

In The

Supreme Court of the United States

October Term, 1994

WALTER A. CONNOR, JR.,

Petitioner,

vs.

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES J. STREIFF
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June 5, 1995

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Respondent's compliance with the Notice of Levy issued by the Internal Revenue Service, and the subsequent levy upon the Petitioner's pension benefits, resulted in a violation of the levy provisions of the Internal Revenue Code and the denial of due process to the Petitioner.

PARTIES TO THE PROCEEDING BELOW

Appellant/Cross Appellee in the United States Court of Appeals for the Third Circuit, and Petitioner herein, is Walter A. Connor, Jr., an individual.

Appellee/Cross Appellant in the United States Court of Appeals for the Third Circuit, and Respondent herein, is the Western Pennsylvania Teamsters and Employers Pension Fund, a jointly trusteed pension fund, administered pursuant to 29 U.S.C. §186(c)(5) by a Board of Trustees, consisting of five Trustees who are appointed by member Teamsters Local Unions located in the Western Pennsylvania and Northern Maryland areas, and five Trustees who are appointed by contributing employers to the Pension Fund.

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No. 94-1824

In The

Supreme Court of the United States

October Term, 1994

WALTER A. CONNOR, JR.,

Petitioner,

vs.

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT:

The Respondent, the Western Pennsylvania Teamsters and Employers Pension Fund, respectfully requests that the Court deny the Petition For Writ Of Certiorari ("Petition") submitted by the Petitioner, Walter A. Connor, Jr.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit, entered on February 3, 1995, denying Petitioner's Petition For Rehearing is unreported, and is reprinted at pages 8a-9a of the Appendix to the Petition.

The Judgment Order of the United States Court of Appeals for the Third Circuit, entered on November 7, 1994, affirming the District Court's Order is unreported, and is reprinted at pages 5a-7a of the Appendix to the Petition.

The Order of the United States District Court for the Western District of Pennsylvania, entered on December 23, 1993, adopting the Magistrate's Report And Recommendation is unreported, and is reprinted at pages 2a-4a of the Appendix to the Petition.

The Report And Recommendation of the United States Magistrate Judge, United States District Court for the Western District of Pennsylvania, entered on November 22, 1993, is unreported, and is reprinted at pages 11a-24a of the Supplemental Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

In addition to the constitutional and statutory provisions cited by the Petitioner, the Respondent submits the following to the Court:

26 U.S.C. §6331 Levy And Distraint.

(a) Authority of Secretary. If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property. The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and

obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible). . . .

26 U.S.C. §6332 Surrender Of Property Subject To Levy.

(a) Requirement. Except as otherwise provided in this section, any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

* * *

(d) Enforcement of Levy. (1) Extent of personal liability. Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at the underpayment rate established under section 6621 from the date of such levy (or, in the case of a levy described in section 6331(d)(3), from the date such person would otherwise have been obligated to pay over such amounts to the taxpayer).

Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) Penalty for violation. In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(e) Effect of honoring levy. Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.

(f) Person defined. The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

COUNTERSTATEMENT OF THE CASE

The Petitioner, Walter A. Connor, Jr., was an active participant with the Respondent, the Western Pennsylvania Teamsters and Employers Pension Fund ("Pension Fund"), for 28 years, retired effective June 1, 1992, and received the monthly pension benefit of $865.03. The Pension Fund is a jointly trusteed multiemployer pension fund, whose operation is governed by various federal laws, particularly the Employee Retirement Income Security Act of 1974, as amended ("ERISA") (29 U.S.C. §1001, *et seq.*) (S.App. 13a).

On March 3, 1993, the Pension Fund Office received from the Internal Revenue Service ("IRS") a letter and an attached Notice Of Levy On Wages, Salary, And Other Income ("Notice of Levy"), both dated February 8, 1993. The letter stated that the Petitioner was not entitled to any exemptions under Section 6334(a)(9) of the Internal Revenue Code ("Code") (26 U.S.C. §6334(a)(9)), and that the Pension Fund was required to pay the Petitioner's monthly pension benefit of $865.03 directly to the IRS, effective with the payment commencing on April 1, 1993, until the assessment of $119,739.11 was satisfied. The Pension Fund's Board of Trustees ("Trustees"), at a meeting on March 4, 1993, directed the Pension Fund Office to comply with the Notice of Levy starting with the monthly payment effective April 1, 1993 (S.App. 13a-14a).

The Petitioner objected to the Trustees' decision and requested an appeal of the decision. An appeal hearing was held on March 25, 1993, and the Petitioner was permitted to present testimony, and submit documents, to a Panel of Trustees. Upon consideration of the Panel's

recommendations, the Trustees denied the appeal at a meeting on April 8, 1993. As the result, with the pension benefit payment on April 1, 1993, and each month thereafter, the Petitioner's pension benefit of $865.03 has been paid directly to the IRS (S.App. 16a-17a).

On August 9, 1993, the Petitioner commenced an action against the Pension Fund in the Court of Common Pleas of Allegheny County, Pennsylvania. On September 2, 1993, the Pension Fund removed the proceeding to the United States District Court for the Western District of Pennsylvania.

On November 22, 1993, the United States Magistrate Judge entered the Report And Recommendation ("Report") recommending that: (1) the Pension Fund's Cross Motion For Summary Judgment be granted and the proceeding be dismissed; and (2) the Pension Fund's request for reasonable attorneys' fees and costs be denied (S.App. 11a). The District Court, by Order entered on December 23, 1993, adopted the Report and dismissed the proceeding (App. 2a).

The Petitioner subsequently filed an appeal (Docket No. 94-3023) with the United States Court of Appeals for the Third Circuit requesting the reversal of the District Court's Order. The Pension Fund filed a cross appeal (Docket No. 94-3024) from the failure of the District Court's Order to grant the Pension Fund's request for reasonable attorneys' fees and costs. By Judgment Order, entered on November 7, 1994, the Court of Appeals affirmed the District Court's Order (App. 5a). The Court of Appeals subsequently denied Petitioner's Petition For

Rehearing by Order, entered on February 3, 1995 (App. 8a).

SUMMARY OF THE ARGUMENT

The Court of Appeals did not commit error in affirming the District Court's adoption of the Magistrate's Report And Recommendation, which found that the Pension Fund's compliance with the Notice of Levy issued by the Internal Revenue Service was reasonable and was mandated by Section 6332(a) of the Internal Revenue Code. The failure to comply with the Notice of Levy would have subjected the Pension Fund to the payment of a 50% penalty pursuant to Section 6332(d) of the Internal Revenue Code, and would have resulted in the wasting of the Pension Fund's assets by the payment of the penalty. By complying with the Notice of Levy and the pertinent provisions of the Internal Revenue Code, the Pension Fund is immune and indemnified against any objections raised by the Petitioner. The arguments raised by the Petitioner objecting to the Pension Fund's compliance with the Notice of Levy have been consistently held to be meritless by the courts. Thus, the decision of the court below is fully consistent with established federal law and further review is not warranted.

ARGUMENT FOR DENIAL OF THE WRIT

I. THE COURT BELOW CORRECTLY FOUND THAT THE UTILIZATION OF THE NOTICE OF LEVY BY THE INTERNAL REVENUE SERVICE TO LEVY UPON THE PETITIONER'S PENSION BENEFITS DID NOT VIOLATE DUE PROCESS AND FURTHER REVIEW IS NOT WARRANTED

The Petitioner's primary argument in the Petition is that the Notice of Levy was improper and a violation of due process, because it was not accompanied by a notice of distraint or seizure, and the Pension Fund was required to inquire into the IRS procedures resulting in the Notice of Levy. The Magistrate's Report thoroughly reviewed the precedents and the pertinent provisions of the Code, and rejected this argument, finding that

> *[t]he tax levy procedure which permits the IRS to levy on property does not violate due process. Christensen v. U.S.*, 733 F.Supp. 844, 853-54 (D.N.J. 1990), *aff'd*, 925 F.2d 416 (3d Cir. 1991). Further, the IRS may levy under §6331 of the Internal Revenue Code without a judgment in a court of competent jurisdiction. *Id.* at 850. Thus, the Pension Fund was not required to obtain a court order before complying with the instant Notice of Levy, and there is no evidence which shows that said Notice was improper.
>
> (S.App. 17a-18a) (Emphasis added)

The Petitioner's contention that the Notice of Levy, without a warrant of distraint or seizure, is not a levy, has no merit. The power of levy includes the power of distraint and seizure by any means, and the IRS is not required to issue a warrant of distraint to make a levy

effective. It is sufficient, as in this proceeding, that a Notice of Levy is served on the custodian holding the funds of a delinquent taxpayer to make the levy effective. *See Schiff v. Simon & Schuster, Inc.*, 780 F.2d 210, 212 (2nd Cir. 1985); *Rosenblum v. United States*, 300 F.2d 843, 845 (1st Cir. 1962); *United States v. Manufacturers National Bank*, 198 F.Supp. 157, 158-59 (N.D. N.Y. 1961). Thus, as correctly noted in the Report, "[a] levy is effective upon the IRS' service of the notice of levy", citing *Resolution Trust Corporation v. Gill*, 960 F.2d 336, 340 (3d Cir. 1992) (S.App. 17a).

The Petitioner's argument also fails to acknowledge that the use of a Notice of Levy form to levy upon property is expressly provided by the Treasury Regulations. Moreover, the case law has, without exception, supported the use of a Notice of Levy form to levy a taxpayer's property. *See, e.g., United States v. National Bank of Commerce*, 472 U.S. 713, 720, 105 S.Ct. 2919, 2924 (1985); *Phelps v. United States*, 421 U.S. 330, 335, 95 S.Ct. 1728, 1732 (1975); *St. Louis Union Trust Co. v. United States*, 617 F.2d 1293, 1302 (8th Cir. 1980).

Lastly, the Petitioner could have contested the validity of the levy and the Notice of Levy, by filing a claim for refund with the IRS, pursuant to Section 7422 of the Code (26 U.S.C. §7422), but did not. *See Johnson v. United States*, 566 F.Supp. 1012, 1014 (M.D. Fla. 1983); *Sunderlin v. Oneida National Bank of Utica*, No. 77-CV-320, 1978 WL 4491, 78-2 USTC ¶9486 (N.D. N.Y. May 24, 1978).

The finding by the Magistrate, as adopted by the District Court and affirmed by the Court of Appeals, that the issuance of the Notice of Levy and the levy of the

Petitioner's pension benefits did not violate due process, is fully consistent with precedent, comports with the pertinent provisions of the Code and, therefore, no further review is warranted.

II. THE COURT BELOW CORRECTLY FOUND THAT THE PENSION FUND WAS REQUIRED TO COMPLY WITH THE NOTICE OF LEVY AND WAS IMMUNE FROM LIABILITY FOR COMPLYING WITH THE NOTICE OF LEVY AND FURTHER REVIEW IS NOT WARRANTED

A. The Pension Fund Was Required To Comply With The Notice Of Levy Or It Would Have Been Subjected To Personal Liability

The Petitioner argues in the Petition that the Pension Fund, by complying with the Notice of Levy, failed to follow the levy and seizure procedures of the Code resulting in an unlawful conversion of his property (pension benefits) and the denial of due process. The Magistrate's Report correctly rejected this argument by finding that " . . . the Pension Fund was required to surrender the plaintiff's monthly benefits to the IRS upon receiving the Notice of Levy." (S.App. 19a) The Report also noted that

> [h]ad the Pension Fund not complied with the IRS' Notice of Levy, it would have incurred personal liability pursuant to section 6332(d) of the Internal Revenue Code, 26 U.S.C. §6332(d). . . .
>
> (S.App. 19a)

The Report further concluded that

> . . . the plaintiff's argument that the Pension Fund unlawfully converted his property is without merit.
>
> (S.App. 20a)

Section 6332(a)[1] of the Code (26 U.S.C. §6332(a)), provides for an IRS levy upon property of a delinquent taxpayer.

> . . . [A]ny person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, *except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.*
>
> (Emphasis added)

Section 6332(a) provides only two circumstances that would have justified the Pension Fund's non-compliance with the Notice of Levy: the Pension Fund was either not

---

[1] A "person for the purpose of Section 6332 of the Code is defined at Section 6332(f), as follows:

> The term "person" . . . includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

A number of courts have held that trustees of employee benefit plans subject to ERISA are "persons" within the meaning of Section 6332(f). *See, e.g., Carman v. Parsons*, 789 F.2d 1532, 1534 (11th Cir. 1986); *Johnson v. United States*, 566 F.Supp. 1012, 1014 (M.D. Fla. 1983).

"in possession of" or "obligated with respect to" the Petitioner's pension benefits, or the Petitioner's pension benefits were subject to a prior judicial attachment or execution. *See United States v. National Bank of Commerce*, 472 U.S. 713, 721-22, 105 S.Ct. 2919, 2925 (1985); *United States v. Sterling National Bank & Trust Co.*, 494 F.2d 919 (2nd Cir. 1974).

However, neither of the circumstances provided in Section 6332(a) existed and, therefore, the Pension Fund was not required to investigate the validity of the Notice of Levy or determine whether the IRS properly followed its own procedures in issuing and serving the Notice of Levy. *United States v. Metro Interior, Inc.*, No. 90-0889-CV-W-1, 1992 WL 464226, 93-1 USTC ¶50,073 (W.D. Mo. October 5, 1992). Moreover, the fact that the Petitioner disputed the issuance or enforcement of the Notice of Levy by the IRS was not a circumstance under Section 6332(a) that would have justified non-compliance with the Notice of Levy. *See Schiff v. Simon & Schuster, Inc.*, 780 F.2d 210, 212 (2nd Cir. 1985); *United States v. Augspurger*, 508 F.Supp. 327, 328-29 (W.D. N.Y. 1981).

Lastly, as the Report noted (S.App. 19a-20a), the failure to comply with the Notice of Levy would have subjected the Pension Fund to personal liability and the payment of a 50% penalty pursuant to Section 6332(d), as follows:

> (1) . . . Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered. . . .

> (2) . . . In addition to the personal liability imposed . . . if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, *such person shall be liable for a penalty equal to 50 percent of the amount recoverable.* . . .
>
> (Emphasis added)

The payment of the 50% penalty would have resulted in the wasting of the Pension Fund assets, and subjected the Trustees to a violation of the "prudent man" fiduciary standard of ERISA. *See* 29 U.S.C. §1104(a); *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 302 (7th Cir. 1985), *on reh. en banc*, 805 F.2d 682 (7th Cir. 1986) ("The fiduciary standards 'must be enforced with uncompromising rigidity' ".).

The Magistrate correctly determined that the Pension Fund was required to comply with the provisions of the Notice of Levy, and the District Court and the Court of Appeals did not commit error by affirming the Magistrate's finding.

B. The Pension Fund Was Immune From Liability For Complying With The Notice Of Levy

The Report, citing Section 6332(e) of the Code (26 U.S.C. §6332(e)), correctly found that " . . . it is clear that the Pension Fund is exempt from liability as to the plaintiff for complying with the Notice of Levy." (S.App. 20a) Section 6332(e) provides, as follows:

> Any person in possession of (or obligated with respect to) property or rights to property subject

> to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1)) *shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.*
>
> (Emphasis added)

See also Treasury Regulation 301.6332-1(c)(1).

The law is well-settled that compliance with an IRS levy is a complete defense against any action brought by the taxpayer. *See, e.g., Farr v. United States*, 990 F.2d 451, 456 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 634 (1993) (" . . . the party in possession [of property levied] has limited defenses to a levy on a taxpayer's property interest and will proceed at his own peril if he refuses to honor the levy."); *Burroughs v. Wallingford*, 780 F.2d 502, 503 (5th Cir. 1986); *Schiff v. Simon & Schuster, Inc.*, 780 F.2d 210, 212 (2nd Cir. 1985); *United States v. Weintraub*, 613 F.2d 612, 621 n.33 (6th Cir. 1979), *cert. denied*, 447 U.S. 905, 100 S.Ct. 2987 (1980); *Johnson v. United States*, 566 F.Supp. 1012, 1014 (M.D. Fla. 1983); *Forster v. United States*, No. B-82-1029-CA, 1983 WL 1701, 84-1 USTC ¶9124 (E.D. Tx. October 9, 1983); *Sunderlin v. Oneida National Bank of Utica*, No. 77-CV-320, 1978 WL 4491, 78-2 USTC ¶9486 (N.D. N.Y. May 24, 1978); *DiEdwardo v. First National Bank of Bath*, 442 F.Supp. 499, 500 (E.D. Pa. 1977).

The Magistrate correctly found that by honoring the provisions of the Notice of Levy requiring the payment of the Petitioner's monthly pension benefit to the IRS, the

Pension Fund complied with federal law and is immune from liability to the Petitioner. Neither the District Court nor the Court of Appeals committed error by adopting and affirming this finding by the Magistrate.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition For Writ Of Certiorari be denied in its entirety.

Respectfully submitted,

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June 5, 1995

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No. 94-1824

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

WALTER A. CONNOR, JR.,
Petitioner,

vs.

WESTERN PENNSYLVANIA TEAMSTERS
AND EMPLOYERS PENSION FUND,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

Walter A. Connor, Jr.
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June 15, 1995

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REPLY

Albeit the Petitioner's Brief relied upon the FEDERAL TAX LIEN ACT OF 1966 which clearly evinces the intent of the United States Congress when passing this legislative tax act, the Respondent did not address or attempt to refute any of the principles of law contained therein.

Respondent's Brief at page 3 quotes Paragraph (a) of Internal Revenue Code Section 6331 albeit this paragraph deals with the effect of a levy upon the accrued salary or wages of any officer, employee, or elected official, of the United States, District of Columbia, etc., and is therefore not relevant to the instant case.

Respondent's Brief at page 6 states that the letter dated February 8, 1993 which accompanied the Form 668-W(c) "required" Respondent to send Petitioner's monthly benefit to the IRS until an "assessment" was satisfied, and that such action must commence on a specific date. All of which is totally untrue.

The verbatim text of the letter follows:

> To Whom It May Concern:
>
> The taxpayer identified in the enclosed notice of levy is not entitled to the exemption under section 6334(a)(9) of the Internal Revenue Code. Therefore, please disregard the instructions about the exemptions under that Code section on the back of Part 1 of the notice. Parts 4 and 5 of the notice have been removed and the Table for figuring the amount exempt from the levy is not enclosed.
>
> This levy attaches the taxpayer's take-home pay. Please attach Part 3 to the check you send us. There is no

> need for your employee to complete the statement of exemptions on Part 3.
>
> If you have any questions, please contact the person whose name and telephone number are shown above.

As shown, the letter doesn't "require" anything at all; nor does it mention any date or dollar amounts. Thus it is palpable that Respondent's intent in making these fraudulent allegations was to transfer responsibility for Respondent's folly to the letter writer, and to mislead the Court.

Respondent's Brief quotes Internal Revenue Code Sections 6331 and 6332. Respondent is seemingly unable to comprehend the significance of these words contained in Section 6332(a):

> Property subject to levy upon which a levy has been **MADE**. (Emphasis added).

If no levy has been **MADE** by the giving of a Notice of Seizure, Form 2433, as required by Internal Revenue Code Section 6502(b), Section 6332(d) does not compel compliance, and Section 6332(e) does not grant immunity nor indemnity.

Respondent knew or should have known that it has not been given a Notice of Seizure, Form 2433, and therefore, no levy has been made. Therefore, Respondent's actions are improper, illegal, and unconscionable, especially so because Respondent is Petitioner's fiduciary.

Respondent alleges and maintains that its actions are compelled by Form 668-W(c), i.e. that Form 668-W(c) constitutes a levy. Respondent's position conflicts with Internal Revenue Code Section 6502(b) which states that:

> The date on which a levy upon property or right to property is **MADE** shall be the date on which the notice of seizure provided in section 6335(a) is given. (Emphasis added).

Respondent's position also conflicts with Internal Revenue Code Section 6331(b) which states in its second sentence:

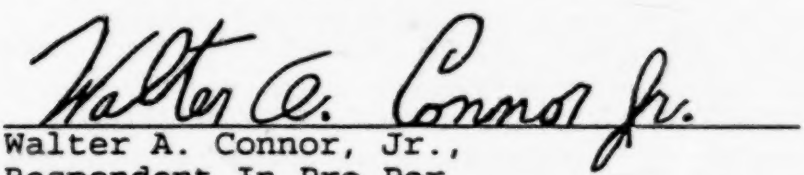
> Except as otherwise provided in subsection (e) a levy shall extend only to property possessed and obligations existing at the time thereof.

Section 6331(e) states that only a levy on salary or wages is continuous. Therefore, even if the Respondent's fallacious statements in re, the letter dated February 8, 1993, were true, and even if the Form 668-W(c) had been augmented or supplemented by a Notice of Seizure Form 2433, and thus a bona fide levy had been **MADE**, Respondent would not have had the right or option to delay the effect of such levy from the date of

receipt, March 3, 1993, until the first day of the following month, April, unless the property being levied were either salary or wages. Further, only salary and wages could be repeatedly affected by a single-one-time levy.

Thus it is clear that Respondent's actions resulted from Respondent's erroneous conclusions of law, seriatim, which have deprived Petitioner of his property as well as his constitutionally guaranteed right to due process of law.

Respectfully submitted,



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June 15, 1995